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No. _____

In The

Supreme Court of the United States

ROBERT R. KRILICH, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS*
MARK D. HOPSON
KRISTIN GRAHAM KOEHLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

**Counsel of Record*

August 10, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Environmental Protection Agency, consistent with the Clean Water Act and Commerce Clause of the United States Constitution, may assert jurisdiction over isolated, intrastate waters solely because those waters do or potentially could serve as a habitat of migratory birds.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioners other than the one listed in the caption are Krilich Companies, Inc. and Riverwoods Development Corp. The other parties in the proceedings below were Lakemoor Country Club, Inc., Austin State Bank Trust, not individually, but as Trustee under the Trust Agreement dated December 18, 1968 and known as Trust No. 4580, Manufacturers' Affiliated Trust Co., not individually, but as Trustee under the Trust Agreements dated July 30, 1982 and known as Trust Nos. 866 and 867, f/k/a Affiliated Bank/Franklin Park f/k/a First State Bank & Trust of Franklin Park.

Pursuant to Supreme Court Rule 29.6, Krilich Companies, Inc. and Riverwoods Development Corp. are corporations closely held by Petitioner Robert R. Krilich. These corporations do not have parent companies, or subsidiaries, or affiliates that have issued common stock or debt securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Robert R. Krilich, Krilich Companies, Inc., and Riverwoods Development Corp. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 209 F.3d 968 (7th Cir. 2000) and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-10a. The memorandum opinion and order of the district court is unreported and is reprinted in Pet. App. at 11a-18a.

JURISDICTION

The court of appeals entered judgment on April 12, 2000. On July 5, 2000, Justice Stevens extended the time for filing the petition for a writ of certiorari to and including August 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution provides, in relevant part, as follows: "The Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8.

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1344(a), and 1362(7), are reprinted in Pet. App. at 19a. The pertinent regulations, 40 C.F.R. § 230.3(s)(3) and 33 C.F.R. § 328.3(a)(3), are reprinted in Pet. App. at 20a-21a. The migratory bird rule, which is found in the preamble to 51 Fed. Reg. 41,206 (1986), is reprinted in Pet. App. at 21a.

STATEMENT OF THE CASE

The issue in this case is whether the Environmental Protection Agency ("EPA") has the authority, under the Clean Water Act and the Commerce Clause, to regulate isolated, intrastate waters, whose only connection to interstate commerce is the actual or potential presence of migratory birds.

A. Statutory And Regulatory Background

Congress enacted the Clean Water Act in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Clean Water Act specifically prohibits "the discharge of dredged or fill material into the navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1344(a), Pet. App. at 19a. According to the terms of the Clean Water Act, "navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7), Pet. App. at 19a.

The EPA and the United States Army Corps of Engineers, pursuant to their shared responsibility for administering and enforcing the Clean Water Act, have promulgated identical regulations which define "waters of the United States" broadly to include not only interstate waters, but also intrastate waters – otherwise completely unrelated to interstate commerce – whose use could affect interstate commerce. Specifically, the regulations define "waters of the United States" as *"[a]ll other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, . . . *the use, degradation or destruction of which could affect interstate or foreign commerce."* 40 C.F.R. § 230.3(s)(3) (EPA); 33 C.F.R. § 328.3(a)(3) (Army Corps), Pet. App. at 20a-21a (emphasis added).

In addition, the preamble to these regulations states that the phrase "waters of the United States" includes all other waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (1986), Pet. App. at 21a. This language in the preamble is commonly referred to as the "migratory bird rule."

B. Factual Background

Robert R. Krilich, Krilich Companies, Inc., and Riverwoods Development Corp. (collectively "Petitioners") are involved in real estate development in the Chicago area. The specific site at issue in this case is the Royce Renaissance property in Oakbrook Terrace, Illinois. On August 7, 1992, the EPA filed a complaint in the United States

District Court for the Northern District of Illinois, alleging that Petitioners had illegally discharged fill into isolated, intrastate wetlands on the Royce Renaissance property, in violation of section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), because they had not obtained a permit issued by the Army Corps of Engineers, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. The EPA's position was that these isolated, intrastate waters were "waters of the United States" because of their actual or potential use by migratory birds.

Petitioners and the EPA entered into a consent decree regarding the Royce Renaissance property, which was adopted by the district court on October 29, 1992 ("Decree"). Pursuant to the Decree, Petitioners were required to remediate specified wetlands on the property, to construct a 3.1 acre pond to compensate for wetlands that were allowed to remain filled, and to pay a fine. The Decree provided specific deadlines for the construction of the pond and monetary penalties for failure to meet those deadlines.

When Petitioners were unable to meet the deadlines for construction of the pond on the Royce Renaissance property, the United States moved to enforce the penalty provisions in the Decree. The district court found that Petitioners had violated the remediation plans contained in the Decree and imposed a penalty of $1,307,500. *United States* v. *Krilich*, 948 F. Supp. 719, 728 (N.D. Ill. 1996). The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment. *United States* v. *Krilich*, 126 F.3d 1035 (7th Cir. 1997). The appellate court, however, remanded the case for entry of an amended

judgment in order to correct a miscalculation of the penalty, which the United States had conceded on appeal. Consequently, on December 15, 1997, the district court entered a modified judgment in the amount of $1,257,500.

On November 2, 1998, Petitioners moved, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to bar enforcement of the penalty. Pet. App. at 12a. Because the wetlands in question were isolated, intrastate wetlands,[1] Petitioners contended that those wetlands did not have a sufficient connection to interstate commerce and were beyond the EPA's power to regulate. *Id.* at 14a. If the wetlands were not within the EPA's power to regulate, Petitioners argued that the district court lacked subject matter jurisdiction over the EPA's complaint and that its earlier orders and judgments were void. *Id.* at 12a. Finally, Petitioners asserted that this challenge to the court's subject matter jurisdiction had not been waived because defects in subject matter jurisdiction may be raised at any time. *Id.* at 13a. Simply stated, Petitioners' position was: if the EPA had no authority to commence the action, then the district court had no jurisdiction to entertain it.

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[1] Throughout this action, Petitioners have maintained, and the lower courts have assumed, that the wetlands at issue were isolated, intrastate wetlands. Pet. App. at 3a, 15a. The only arguable basis for the EPA's jurisdiction over the wetlands, therefore, would have been if the use of the wetlands affected interstate commerce. 40 C.F.R. § 230.3(s)(3); 33 C.F.R. § 328.3(a)(3), Pet. App. at 20a-21a. There could be no alternative basis for jurisdiction because the wetlands at issue are neither interstate wetlands nor wetlands adjacent to other navigable waters of the United States. 40 C.F.R. § 230.3(s); 33 C.F.R. § 328.3(a).

The district court agreed with Petitioners that "the question of whether there is a sufficient nexus to interstate commerce is clearly a jurisdictional issue that can be raised at any time." Pet. App. at 15a. The district court, therefore, addressed directly the issue presented regarding whether the EPA, consistent with Commerce Clause and Clean Water Act limitations, may regulate isolated, intrastate wetlands. The court relied upon the Ninth Circuit's decision in *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1395-96 (9th Cir. 1995), and the district court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 998 F. Supp. 946, 954-55 (N.D. Ill. 1998), as precedent supporting the position "that isolated wetlands are a sufficient basis for CWA regulation." Pet. App. at 16a. The district court acknowledged that the Fourth Circuit had reached a contrary conclusion in *United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). However, according to the district court, "[t]here was and continues to be a colorable basis for exercising jurisdiction over the Decree's subject matter and it cannot be held that jurisdiction in this case was totally wanting." Pet. App. at 16a. The court, therefore, concluded that "[t]he December 1997 judgment is not a void judgment that is subject to being vacated for lack of subject matter jurisdiction." *Id.*

C. Decision Of The Court Of Appeals

The United States Court of Appeals for the Seventh Circuit affirmed. First, the Seventh Circuit panel held that the absence of a nexus between the subject property and interstate commerce did not affect the district court's subject matter jurisdiction, but was rather an element of the offense. Pet. App. at 9a. Second, the panel held that

"just as a guilty plea (in which the criminal defendant admits – at least implicitly – the connection between his conduct and interstate commerce) forecloses an appellate attack on subject matter jurisdiction, [Petitioners] cannot now assail the district court's subject matter jurisdiction because [they] entered into a consent decree" which conceded jurisdiction over the controversy. *Id.* at 8a. Thus, the court declined to reach the constitutional and statutory issue presented to it and decided by the district court:

> Because the district court had subject matter jurisdiction over the EPA's complaint based on the terms of the consent decree, we need not determine whether, in light of the Supreme Court's decision in *United States v. Lopez*, regulation of isolated intrastate wetlands is beyond Congress' power under the Commerce Clause. *Compare, United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), *with Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 848 (7th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3480 (U.S. Jan. 14, 2000) (No. 99-1178). *See also Cargill, Inc. v. United States*, 516 U.S. 955, 958, 116 S. Ct. 407, 133 L.Ed.2d 325 (1995) (Thomas, J., dissenting from denial of certiorari) ("In this case, the Corps' basis for jurisdiction rests entirely on the actual or potential presence of migratory birds on petitioner's land. In light of *Lopez*, I have serious doubts about the propriety of the Corps' assertion of jurisdiction over petitioner's land in this case. . . . ").

Pet. App. at 10a n.5.

ARGUMENT

This case presents an important and recurring issue of federal law regarding whether the EPA may regulate isolated, intrastate waters, consistent with the limits on EPA's regulatory authority inherent in the Clean Water Act and the Commerce Clause. Although the panel below refused to reach this issue, the answer certainly must be "no," particularly in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), which significantly altered the Court's Commerce Clause jurisprudence. To date, however, at least four courts of appeals have issued decisions on this question of substantial legal significance and great practical importance and have reached conflicting conclusions. Compare *United States* v. *Wilson*, 133 F.3d 251, 253-54 (4th Cir. 1997), with *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 191 F.3d 845, 847 (7th Cir. 1999), *Leslie Salt Co.* v. *United States*, 896 F.2d 354, 355 (9th Cir. 1990), and *Utah* v. *Marsh*, 740 F.2d 799, 800 (10th Cir. 1984). As a result, a clear conflict currently exists among the circuit courts. This Court has granted the petition for a writ of certiorari in *Solid Waste*, and the Court's decision in that case likely will resolve the conflict and provide guidance on the question presented in this case. *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000). Accordingly, the Petitioners respectfully submit that their petition for a writ of certiorari should be held pending the Court's decision in *Solid Waste* and then disposed of as appropriate in light of the Court's decision.

1. Contrary to the decision below, the question of whether a federal enforcement action exceeds congressional authority under the Commerce Clause bears directly on a court's subject matter jurisdiction and, therefore, is never waived. For example, in *Ex parte Yarbrough*, 110 U.S. 651 (1884), this Court held that "[i]f the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoner must be discharged." *Id.* at 654. Similarly, in *United States* v. *Walker*, 59 F.3d 1196 (11th Cir. 1995), a defendant challenged on appeal the constitutionality of one of the statutes under which he was convicted on the ground that the statute exceeded congressional authority under the Commerce Clause. *Id.* at 1198. The United States argued that the defendant had waived his constitutional challenge to the statute. *Id.* The Eleventh Circuit held that the conviction could not "stand under a statute which Congress was without power to enact. In essence, the statute was void *ab initio*, and consequently, the district court below lacked subject matter jurisdiction with respect to that charge." *Id.*; see also *United States* v. *Gaydos*, 108 F.3d 505, 508-09 (3d Cir. 1997) (acknowledging that the question whether a statute exceeds congressional authority under the Commerce Clause affects federal courts' subject matter jurisdiction). Thus, the refusal of the panel below to reach the constitutional issue decided by the district court does not and should not preclude Petitioners from challenging the EPA's constitutional and statutory power to assert regulatory authority over the isolated, intrastate wetlands in question.

2. The significant shift in this Court's Commerce Clause jurisprudence, which began in *United States* v.

Lopez, 514 U.S. 549 (1995), casts considerable doubt on the EPA's assertion of federal jurisdiction over isolated, intrastate wetlands and calls into question the continued validity of the consent decree entered into in this case. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. *Id.* at 551. In reaching this conclusion, the Court identified the "three broad categories of activity that Congress may regulate under its commerce power": (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities that substantially affect interstate commerce." *Id.* at 558-59. With respect to the third category, the Court admitted that its "case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." *Id.* at 559. The Court concluded that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* The Court determined that the firearm statute at issue did not regulate an activity that substantially affects interstate commerce. *Id.*

The Court's decision in *Lopez* marked a departure from decades of this Court's decisions that had afforded tremendous deference to congressional action under the Commerce Clause. The *Lopez* Court acknowledged that such a retreat was necessary in order to maintain "a distinction between what is truly national and what is truly local." *Id.* at 567-68. That distinction, which always

had existed in theory, has become one of increasing practical significance as this Court has demonstrated a willingness to scrutinize congressional action under *Lopez*'s analytical framework. See, *e.g.*, *United States* v. *Morrison*, ___ U.S. ___, 120 S. Ct. 1740, 1745 (2000) (holding that Congress lacked authority under the Commerce Clause to enact the civil remedy in the Violence Against Women Act, 42 U.S.C. § 13981).

In the instant case, the "all other waters" regulation requires only that the waters "could affect interstate or foreign commerce" and the "migratory bird rule" requires only that the waters "are or would be used" by migratory birds. Because these regulations do not require any actual effect on interstate commerce – let alone a substantial effect on interstate commerce – they are insufficient to pass constitutional muster under *Lopez*. See *Cargill, Inc.* v. *United States*, 516 U.S. 955, 958 (1995) (Thomas, J., dissenting from denial of certiorari) ("In this case, the Corps' basis for jurisdiction rests entirely on the actual or potential presence of migratory birds on petitioner's land. In light of *Lopez*, I have serious doubts about the propriety of the Corps' assertion of jurisdiction. . . . [T]he Corps' expansive interpretation of its regulatory powers under the Clean Water Act may test the very 'bounds of reason,' and, in my mind, likely stretches Congress' Commerce powers beyond the breaking point.") (citations omitted). Although Petitioners could not reasonably have expected to succeed in challenging the EPA's assertion of jurisdiction in 1992, when the consent decree was entered, given this Court's Commerce Clause jurisprudence at that time, this Court's 1995 decision in *Lopez* effectively places the conduct at issue in

this case beyond the reach of federal law. Petitioners should not now be forced to acquiesce in an essentially lawless assertion of federal jurisdiction over their property.

3. The proper scope of the EPA's authority under the Clean Water Act and the Commerce Clause is an issue that has sharply divided the courts of appeal. Specifically, the Fourth Circuit has held that the EPA's assertion of jurisdiction over isolated, intrastate waters is constitutionally impermissible. *United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). To the contrary, the Seventh, Ninth, and Tenth Circuits have upheld the EPA's authority under the Commerce Clause to assert such jurisdiction. *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 191 F.3d 845, 847 (7th Cir. 1999); *Leslie Salt Co.* v. *United States*, 896 F.2d 354, 355 (9th Cir. 1990); *Utah* v. *Marsh*, 740 F.2d 799, 800 (10th Cir. 1984).

In *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), the Fourth Circuit held that the asserted federal authority to regulate isolated, intrastate waters was not supported by the terms of the Clean Water Act as limited by the Commerce Clause. In *Wilson*, the conduct in question – like the conduct at issue in this petition – involved the discharge of fill materials into "wetlands," without a permit, in alleged violation of the Clean Water Act. On appeal, the defendants challenged the asserted basis for federal jurisdiction under 33 C.F.R. § 328.3(a)(3), which defines " 'waters of the United States' " to include " '[a]ll other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce.' " *Wilson*, 133 F.3d at 255, 256-57.

The Fourth Circuit began its analysis by noting that "[the] regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could affect interstate commerce.*" *Id.* at 257 (emphasis added). Thus, "[t]he regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters." *Id.* According to the Fourth Circuit, the regulation authorized the assertion of jurisdiction in "a sweeping and constitutionally troubling manner." *Id.* Thus, the court held that the regulation exceeded the authority granted under the Clean Water Act, as limited by the Commerce Clause, and was invalid. *Id.* at 253-54.

By contrast, in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), the Seventh Circuit upheld the EPA's authority to regulate isolated, intrastate waters under the Clean Water Act as consistent with the Commerce Clause. In that case, the plaintiff sought to convert approximately 414 acres of property into a landfill. *Id.* at 848. The Army Corps of Engineers asserted jurisdiction over the property under the migratory bird rule on the ground that the intrastate waters on the property were used or could be used as habitat for migratory birds. *Id.* at 847. Plaintiff filed suit, asserting that the Corps did not have jurisdiction over the property. *Id.* The district court found that the Corps had jurisdiction, and the Seventh Circuit affirmed. *Id.*

The Seventh Circuit rejected the argument that Congress lacked the power to grant regulatory jurisdiction

over isolated, intrastate waters. *Id.* at 849. Rather, the court held that "a federal statute based on the Commerce Clause must serve one of three purposes: (1) regulation of the channels of interstate commerce; (2) regulation or protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce; or (3) regulation of activities that 'substantially affect' interstate commerce." *Id.* (citing *United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995)). Applying the "third variety of regulatory power," the court ruled that "a single activity that itself has no discernable effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 849-50. Because the court found that "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," it concluded that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires." *Id.* at 850. Accordingly, "the decision to regulate isolated waters based on their actual use as habitat by migratory birds is within Congress' power under the Commerce Clause." *Id.* at 853.

Two other circuits have reached decisions that essentially are in accord with the Seventh Circuit's decision in *Solid Waste*. In *Leslie Salt Co.* v. *United States*, 896 F.2d 354 (9th Cir. 1990), the Ninth Circuit held that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local

waters which may provide habitat to migratory birds and endangered species." *Id.* at 360. Similarly, the Tenth Circuit in *Utah* v. *Marsh*, 740 F.2d 799 (10th Cir. 1984), upheld the Army Corps of Engineers' assertion of jurisdiction over an intrastate lake on the ground that the discharge of dredged or fill material into the lake "could well have a substantial economic impact on interstate commerce." *Id.* at 803-04.

In sum, the validity of the EPA's asserted authority over isolated, intrastate waters under the Clean Water Act and the Commerce Clause – and, in particular, its authority under the "migratory bird rule" – is an important and recurring question of federal law on which there is a direct conflict among the courts of appeal.

4. This Court has granted the petition for a writ of certiorari to review the Seventh Circuit's decision and judgment in *Solid Waste. Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000). Resolution of that case very likely will resolve the existing split among the courts of appeals on the question presented in this petition. In fact, the question presented in *Solid Waste* is virtually identical to the question presented here: "May U.S. Army Corps of Engineers, consistent with the Clean Water Act and commerce clause of the U.S. Constitution, assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds?" 68 U.S.L.W. 3505 (U.S. Feb. 8, 2000) (No. 99-1178).

This Court's decision in *Solid Waste* likely will affect the proper disposition of this case. In particular, this

Court's decision in *Solid Waste* is likely to resolve the recurring question of the validity of the migratory bird rule. More generally, the decision in *Solid Waste* likely will clarify the scope of regulatory authority under the Clean Water Act and the Commerce Clause. Accordingly, this petition for a writ of certiorari should be held pending the Court's decision in *Solid Waste* and then disposed of as appropriate in light of the Court's decision in that case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the petition for a writ of certiorari should be held pending this Court's decision in *Solid Waste Agency v. United States Army Corps of Engineers*, No. 99-1178, and then disposed of as appropriate in light of the Court's resolution of that case.

Respectfully submitted,

CARTER G. PHILLIPS*
MARK D. HOPSON
KRISTIN GRAHAM KOEHLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* *Counsel of Record*

August 10, 2000

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert R. KRILICH, Krilich Companies, Incorporated, Riverwoods Development Corporation, et al.,
Defendants-Appellants.

Nos. 99-2271, 99-2397.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 9, 1999

Decided April 12, 2000

Before COFFEY, MANION, and EVANS, Circuit Judges.

MANION, Circuit Judge.

The EPA civilly charged Robert Krilich with illegally filling a wetland on property he was developing in suburban Chicago, Illinois. Krilich entered into a consent decree with the EPA to settle the dispute, the terms of which required him, among other things, to create a substitute wetland by a specific date, or pay a substantial penalty for any delay. He failed to complete the new wetland by the stated time, so the EPA moved to enforce the terms of the consent decree. The district court granted that motion and fined Krilich in excess of $1.2 million. Krilich appealed from that judgment and we affirmed (although the case was remanded to correct an error in calculating the penalty). Krilich then filed a Rule 60(b)(4)

motion to vacate the judgment as void. The district court denied that motion and he again appeals. We affirm.

I.

Factual and Legal Background

To understand this appeal, we must return to 1992 – both factually and legally. In 1992, the EPA charged Robert Krilich,[1] who was developing the Royce Renaissance Property in Oakbrook Terrace, Illinois, with violating section 301(a) of the Clean Water Act by discharging fill into "wetlands" without first obtaining a section 404 permit. Section 301(a) of the Clean Water Act prohibits "the discharge of any pollutant," except as otherwise authorized by the Clean Water Act. 33 U.S.C. § 1311. Section 404 of the Clean Water Act authorizes the Secretary to issue a permit approving "the discharge of fill material into the navigable waters."[2] 33 U.S.C. § 1344. The Clean Water Act defines "navigable waters" as "waters of the United States," 33 U.S.C. § 1362(7), but does not further describe what is included as part of "waters of the United States." The Act may not cover all of the "water *in* the United States," but it comes close: The EPA and the Army Corps of Engineers have promulgated regulations defining "waters of the United States" to include "intrastate lakes, rivers, streams (including

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[1] The EPA's charge was against Robert R. Krilich individually, and numerous corporations which he controlled. For simplicity, we refer to them merely as "Krilich."

[2] Section 404(a) authorizes the Secretary to issue permits allowing fill materials to be discharged into "navigable waters" but it does not mention "wetlands." *See* 33 U.S.C. § 1344(a).

intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(2); 40 C.F.R. § 230.3(s)(3).[3]

Both the EPA and the Corps have long maintained that this regulatory definition of "waters of the United States" includes "all waters, including those otherwise unrelated to interstate commerce, 'which are or would be used as habitat by birds protected by Migratory Bird Treaties' or 'which are or would be used as habitat by other migratory birds which cross state lines.' " *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 848 (7th Cir. 1999) (quoting 51 Fed. Reg. 41,206, 42,217 (1986)). Based on its view that isolated intrastate waters were "waters of the United States" because of the actual or potential use by migratory birds, the EPA charged Krilich with violating section 301. However, at the time that the EPA first charged Krilich with violating section 301 in August 1992, the law of this circuit was more narrow. This court had just held that Congress did not have the power to regulate isolated intrastate waterways based simply on the supposition that migratory birds, while migrating to seasonal nesting areas, could potentially use the waters. *Hoffman Homes, Inc. v. Administrator, United States EPA*, 961 F.2d 1310, 1311 (7th Cir. 1992) (*Hoffman I*) (rejecting

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[3] The Army Corps of Engineers and the EPA share responsibility for administering and enforcing the Clean Water Act. 33 U.S.C. §§ 1319(a)(3), 1344.

the EPA's claim of jurisdiction "over the intrastate wetland solely on the ground that migratory birds could, potentially, use the wetland as a place to feed, or nest or as a stopover on the way to the Gulf States for the Winter months"), *vacated* 975 F.2d 1554 (7th Cir.1992). But this holding had a short life; it was vacated on September 4, 1992, before the birds had reason to migrate south. *Hoffman Homes*, 975 F.2d 1554.

After *Hoffman I* was vacated, Krilich entered into a consent decree with the EPA, this in spite of the fact that the EPA's charge asserted that he had violated section 301 by filling isolated intrastate wetlands.[4] In the consent decree, Krilich agreed to pay a fine of $185,000, remediate some of the wetlands, and construct a 3.1-acre replacement wetland on the Royce Renaissance property to compensate for the wetlands that had already been filled. The consent decree included specific deadlines for the construction, and provided for monetary penalties for any delay.

As noted, the parties agreed to the consent decree after *Hoffman I* had been vacated for rehearing. On October 29, 1992, the district court entered final judgment pursuant to the terms of that consent decree, and that final judgment was entered before this court issued its decision on rehearing in *Hoffman II*.

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[4] On appeal, the EPA asserts that Krilich also filled wetlands which were not isolated. The district court assumed for purposes of Krilich's Rule 60(b)(4) motion that all of the wetlands were isolated intrastate wetlands, and because it does not alter the outcome of this appeal, we also make this assumption.

After rehearing, on July 19, 1993, this court held in *Hoffman II* that the EPA lacked jurisdiction over the wetlands at issue in that case because the government had failed to present evidence that migratory birds actually used the wetlands as a habitat. *Hoffman Homes, Inc. v. Administrator, United States EPA*, 999 F.2d 256 (7th Cir.1993) (*Hoffman II*). Because the government did not prove actual use by the birds, *Hoffman II* did not reach the issue of whether that would be a sufficient connection to interstate commerce to allow Congress to regulate isolated intrastate wetlands.

Throughout and following the proceedings in *Hoffman I* and *II*, Krilich went about his business constructing the Royce Renaissance Property. He failed, however, to complete the 3.1-acre mitigation pond by the date specified in the consent decree, so the United States moved to enforce the penalties contained in the decree. The district court imposed civil penalties against Krilich of $1,307,500. Krilich appealed from that judgment, arguing that the deadlines had been modified, that the doctrines of impossibility and frustration excused his non-performance, or that the government was equitably estopped from enforcing the penalty provisions. This court rejected those arguments and affirmed the assessment of penalties, but remanded the case to the district court to correct an error made in calculating the penalty, which the government had pointed out on appeal. *United States v. Krilich*, 126 F.3d 1035 (7th Cir.1997).

On remand, Krilich decided to take a different tack – he moved pursuant to Rule 60(b)(4) to vacate the district court's original judgment entered pursuant to the terms of the consent decree. Krilich argued that the district

court lacked subject matter jurisdiction over the EPA's complaint, and therefore that its judgment was void. The district court rejected Krilich's argument, and denied his motion to vacate. Krilich once again appeals.

II.

Analysis

Rule 60(b)(4) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . [if] the judgment is void. . . . " Fed. R.Civ.P. 60(b)(4). Krilich contends that the district court's judgment, which adopted the consent decree and the sanctions contained therein, was void because the court lacked subject matter jurisdiction over the EPA's case against him. Specifically, Krilich asserts that the land he allegedly filled was an "isolated intrastate wetland" which was beyond the federal government's commerce power to regulate. Because Congress lacked authority to regulate his property, Krilich contends that the district court lacked subject matter jurisdiction over the EPA's complaint. And even though he agreed to the terms of the consent decree, which included a provision that the wetlands filled were "waters of the United States," Krilich now argues that this does not change the result because you can never consent to subject matter jurisdiction, and lack of jurisdiction can be raised at any time.

In making this argument, however, Krilich confuses the meaning of "jurisdiction" – "a word of many, too many meanings" according to the Supreme Court. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118

S.Ct. 1003, 140 L.Ed.2d 210 (1998). This court recently examined the problem. "Lawyers and judges sometimes refer to the interstate commerce element that appears in many federal crimes as the 'jurisdictional element,' but this is a colloquialism – or perhaps a demonstration that the word 'jurisdiction' has so many different uses that confusion ensues." *Hugi v. United States*, 164 F.3d 378, 381 (7th Cir.1999) (*citing Kanar v. United States*, 118 F.3d 527, 529-30 (7th Cir.1997)).

"[T]he nexus with interstate commerce, which courts frequently call the 'jurisdictional element,' is simply one of the essential elements of [the offense]. Although courts frequently call it the 'jurisdictional element' of the statute, it is 'jurisdictional' only in the shorthand sense that without that nexus, there can be no federal crime. . . . It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, . . . " *Hugi*, 164 F.3d at 381 (7th Cir.1999). Thus, while "[a] link to interstate commerce may be essential to Congress's substantive authority, *see United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), . . . the existence of regulatory power differs from the subject-matter jurisdiction of the courts." *Hugi*, 164 F.3d at 380-81. The "subject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231, and there can be no doubt that Article III permits Congress to assign federal criminal prosecutions to federal courts. That's the beginning and the end of the 'jurisdictional' inquiry." *Hugi*, 164 F.3d at 381 (quoting *United States v. Martin*, 147 F.3d 529 (7th Cir.1998)). And "once a defendant pleads guilty in a court which has jurisdiction of the subject matter and of the defendant, as did the court in the instant case, the court's judgment

cannot be assailed on grounds that the government has not met its burden of proving 'so-called jurisdictional facts.' " *Hugi*, 164 F.3d at 381 (internal quotations omitted). "Even if the government fails to establish the connection to interstate commerce, the district court is not deprived of jurisdiction to hear the case." *Hugi* 164 F.3d at 381 (quoting *Martin*, 147 F.3d at 532).

While Krilich attempts to distinguish *Hugi* and *Martin* as criminal in nature and not civil, he fails to explain why that makes any difference. It does not. In this case, the interstate connection, *i.e.* that the waters involved were "waters of the United States," is merely an element of the United States' Clean Water Act case under section 301; subject matter jurisdiction over this question involving federal law comes from 28 U.S.C. § 1331. On appeal, Krilich argues at great length that his wetlands cannot constitutionally satisfy the "waters of the United States" element. But "[j]urisdiction under the federal question statute is not defeated by the possibility that the averments, upon close examination, might be determined not to state a cause of action." *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1316-17 (7th Cir. 1997). Moreover, just as a guilty plea (in which the criminal defendant admits – at least implicitly – the connection between his conduct and interstate commerce) forecloses an appellate attack on subject matter jurisdiction, Krilich cannot now assail the district court's subject matter jurisdiction because he entered into a consent decree in which he agreed that the waters involved were "waters of the United States." *Cf. Hugi*, 164 F.3d at 380-81; *Martin*, 147 F.3d at 533.

In response, Krilich also cites *United States v. U.S. Fidelity & Guaranty, Co.*, 309 U.S. 506, 60 S.Ct. 653, 84

L.Ed. 894 (1940), and *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir.1974), to support his position that the consent decree was void. Those cases held that the judgments entered by the trial courts were void because the defendants were immune from suit. He also cites *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940), which held that a state court lacked jurisdiction to enter a judgment against the defendant because a federal statute divested the court of jurisdiction. These cases, however, involve a different meaning of "jurisdiction." As we explained in *Hugi*, "some jurisdictional shortcomings are constitutional in nature, for Article III and the eleventh amendment set limits to the duties Congress may assign to the courts; other jurisdictional deficits are just the result of statutory limitations; . . . " *Hugi*, 164 F.3d at 380. Both *U.S. Fidelity* and *Jordon* involved what we referred to in *Hugi* as the jurisdictional "shortcoming" of immunity. We distinguished that defect from the interstate commerce element which is not jurisdictional in the same sense, but rather is an element of the offense. The absence of such an element is separate from the issue of subject matter jurisdiction. *Hugi*, 164 F.3d at 380. And *Kalb* involved the other jurisdictional shortcoming noted in *Hugi* – a statutory divestment of power, also distinguished from the jurisdictional element of the offense. *Hugi*, 164 F.3d at 380. As explained in *Hugi*, both of these jurisdictional shortcomings "affect[ ] a court's subject matter jurisdiction, i.e., a court's constitutional or statutory power to adjudicate a case," *id.* at 381, whereas the interstate commerce element does not deprive a court of subject matter jurisdiction. Therefore, Krilich's reliance on these cases is misplaced.

In sum, the district court had subject matter jurisdiction over the EPA's case against Krilich because the suit civilly charged a violation of a federal statute which is within the federal courts' federal question jurisdiction. And Krilich's attempt to now assail the court's subject matter jurisdiction fails because he entered into a consent decree stipulating that the waters involved were "waters of the United States," and that is merely an element of the offense and not the basis for federal subject matter jurisdiction.[5] Accordingly, we AFFIRM the district court's denial of Krilich's 60(b)(4) motion to bar the enforcement of the penalty.

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[5] Because the district court had subject matter jurisdiction over the EPA's complaint based on the terms of the consent decree, we need not determine whether, in light of the Supreme Court's decision in *United States v. Lopez*, regulation of isolated intrastate wetlands is beyond Congress' power under the Commerce Clause. *Compare, United States v. Wilson*, 133 F.3d 251 (4th Cir.1997), *with Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 848 (7th Cir.1999), *petition for cert. filed*, 68 U.S.L.W. 3480 (U.S. Jan. 14, 2000) (No. 99-1178). *See also Cargill, Inc. v. United States*, 516 U.S. 955, 958, 116 S.Ct. 407, 133 L.Ed.2d 325 (1995) (Thomas, J., dissenting from denial of certiorari) ("In this case, the Corps' basis for jurisdiction rests entirely on the actual or potential presence of migratory birds on petitioner's land. In light of *Lopez*, I have serious doubts about the propriety of the Corps' assertion of jurisdiction over petitioner's land in this case. . . . ").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 92 C 5354
v.	)	
ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., LAKEMOOR CLUB, INC., AUSTIN STATE BANK TRUST, etc., and MANUFACTURERS AFFILIATED TRUST CO., etc.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In 1992, the parties to this case entered into a consent decree regarding Clean Water Act ("CWA") violations involving wetlands in an area being developed by defendants.[1] Following consideration by the court, the proposed decree, as modified, was entered on October 29, 1992 (the "Decree"). The United States subsequently contended that defendants had violated certain provisions of

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[1] For present purposes, it is unnecessary to make any distinctions among the defendants.

the Decree. The issue was presented on stipulated and asserted facts and briefed by the parties. It was held none of the facts claimed to be in dispute were material and a ruling was issued on the basis of the documents that had been presented. Defendants were held to have violated deadlines for a mitigation plan that were contained in the Decree and therefore were subject to a substantial penalty under the terms of the Decree. *See United States v. Krilich*, 948 F. Supp. 719 (N.D. Ill. 1996) ("*Krilich I*"). In an opinion dated October 15, 1997, this holding was upheld on appeal, except that the government conceded that there had been a miscalculation of the penalty. *See United States v. Krilich*, 126 F.3d 1035 (7th Cir. 1997). On December 15, 1997, a modified judgment in the amount of $1,257,500 was entered on the docket. On November 2, 1998, defendants moved to bar enforcement of this penalty. That motion, which should be construed as being pursuant to Fed. R. Civ. P. 60(b), is presently pending for ruling.

Defendants argue that relief from the judgment should be granted because this court lacked jurisdiction to enforce the mitigation plan deadlines. It is argued that subject matter jurisdiction was lacking because the land that allegedly was improperly filled did not constitute a wetland under the CWA or did not have a sufficient connection with interstate commerce in order to invoke federal jurisdiction. Alternatively, defendants argue that the penalty should not be enforced because the Decree should be modified in light of more recent precedents supporting that the filled lands do not fall within the purview of the CWA. As is explained below, defendants' contentions are without merit.

Defendants contend that jurisdictional issues may be raised at any time. Defendants, however, cite cases in which the jurisdictional issue was raised while the case was still pending. *See, e.g., Clinton v. City of New York*, 524, [sic] U.S. 417, 118 S. Ct. 2091, 2098 (1998) (jurisdictional issue raised for the first time in the Supreme Court); *United States v. Stillwell*, 900 F.2d 1104, 1110 n.2 (7th Cir.), *cert. denied*, 498 U.S. 838 (1990) (jurisdictional issue of sufficient interstate commerce nexus raised for the first time in court of appeals). The present case is different. Here, a judgment was previously entered and the time for filing any further appeal had expired well before the present motion was filed. Still, the jurisdictional issue may be raised at any time. *See* Fed. R. Civ. P. 60(b)(4); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1129-31 (11th Cir. 1994); *R.C. v. Nachman*, 969 F. Supp. 682, 692 (M.D. Ala. 1997), *aff'd by unpublished order*, 145 F.3d 363 (11th Cir. 1998); C.A. Wright, A. Miller, & M.K. Kane, *Federal Practice & Procedure* § 2862 at 324-25 (2d ed. 1995). In the present posture, however, the applicable standard is different than when the jurisdictional issue is raised while a case is still pending. "Want of jurisdiction is not waivable – until the loser has exhausted his appellate remedies, after which courts will not treat the judgment as void unless the jurisdictional error is egregious . . . . If it is not egregious, the courts say that the court that issued the judgment in excess of its jurisdiction had jurisdiction to determine jurisdiction, and its jurisdictional finding, even if erroneous, is therefore good against collateral attack, like any other erroneous but final judgment." *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992). *See also Nachman*, 969 F. Supp. at 692-93; *Honneus v. Donovan*,

691 F.2d 1, 2-3 (1st Cir. 1982); *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980); Wright, Miller, & Kane, § 2862 at 326-31.

The Decree required that defendants implement a mitigation plan because of allegedly improper filling of specified wetlands. Defendants now contend that the areas filled,[2] which allegedly were isolated wetlands, were not "navigable waters" as that term is used in the CWA, *see* 33 U.S.C. § 1344(a),[3] and therefore this court lacked jurisdiction under the CWA. It is also contended that the isolated wetlands are not in interstate commerce and therefore could not be the subject of federal legislation. The government contends that the question of whether the isolated wetlands were navigable waters is not a question that goes to the court's subject matter jurisdiction. However, at least one case has held that it is a requirement for subject matter jurisdiction. *See Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998). *See also United States v. United Homes, Inc.*, 1999 WL 117701 (N.D. Ill. March 1, 1999) (question of whether pollutant fell within Corp of Engineers jurisdiction under the CWA is a question that goes to the court's

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[2] In *Krilich I*, the question of whether area W9, an isolated wetland, was a navigable water was at issue. It was held that, under the terms of the Decree which had a specific provision regarding area W9, W9 was not a navigable water and therefore not subject to certain provisions of the Decree. *Id.* at 721-25. The mitigation plan presently at issue is based on filled lands other than area W9.

[3] The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7).

subject matter jurisdiction). Whether the presence of navigable waters is an issue going to the court's subject matter jurisdiction need not be determined because the question of whether there is a sufficient nexus to interstate commerce is clearly a jurisdictional issue that can be raised at any time. *Stillwell*, 900 F.2d at 1110 n.2.

At the time the Decree was being negotiated, defendants were well aware of the jurisdictional issue they now attempt to raise. *Hoffman Homes, Inc. v. Administrator, United States EPA*, 961 F.2d 1310 (7th Cir. 1992) ("*Hoffman I*"), is specifically referred to in the Decree and some of the requirements of the Decree were conditioned on whether *Hoffman I* might be reversed.[4] *See Krilich I*, 948 F. Supp. at 721-24. The jurisdictional issue that is now raised could have been raised by defendants at the time *Krilich I* was being litigated. More importantly, there is nothing in the Decree nor any other pleadings filed prior to defendant's present motion that makes it apparent that the mitigation plan may have been based solely on the filling of isolated wetlands. Neither was there any information indicating that those wetlands' only possible connection to interstate commerce was their occasional use

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[4] After the parties agreed to the Decree, but before the Decree was approved by the court, *Hoffman I* was vacated for rehearing. Subsequently, the same result was reached, but without having to reach the question of whether isolated wetlands could support jurisdiction under the CWA. *See Hoffman Homes, Inc. v. Administrator, United States EPA*, 999 F.2d 256 (7th Cir. 1993) ("*Hoffman II*"). *See also Krilich I*, 948 F. Supp. at 721-25 (discussing *Hoffman I* and *Hoffman II* and their effect on the construction of certain terms of the Decree).

by migratory birds.[5] Moreover, both presently and in 1996, precedent in this circuit supports that isolated wetlands are a sufficient basis for CWA regulation. *See Rueth v. United States EPA*, 13 F.3d 227, 231 (7th Cir. 1993); *United States v. Hallmark Construction Co.*, 14 F. Supp. 2d 1069, 1072-75 (N.D. I11. 1998); *Solid Waste Agency of Northern Cook Cy. v. United States Army Corps of Engineers*, 998 F. Supp. 946, 954-55 (N.D. Ill. 1998). *See also United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1041-42 (N.D. Ill. 1998). At least one other circuit is in accord. *See Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995). One circuit has reached a contrary conclusion. *See United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). There was and continues to be a colorable basis for exercising jurisdiction over the Decree's subject matter and it cannot be held that jurisdiction in this case was totally wanting. *See Nachman*, 969 F. Supp. at 692-93. The December 1997 judgment is not a void judgment that is subject to being vacated for lack of subject matter jurisdiction.

Defendants' other argument is that the Decree should be vacated in light of a change in the law represented by the Commerce Clause holding in *United States v. Lopez*, 514 U.S. 549 (1995), and *Wilson*'s application of that holding in construing the provisions of the CWA as regards

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[5] The government disputes defendants' present contentions that the only basis for these wetlands falling into the purview of the CWA is as isolated wetlands that are visited by migratory birds. For present purposes, resolution of that factual dispute is unnecessary and it will be assumed that the pertinent wetlands are all isolated wetlands that are visited by migratory birds.

isolated wetlands. *See Wilson*, 133 F.3d at 255-57. *Lopez* was decided after the Decree was entered, but before *Krilich I* was decided in 1996. *Wilson* was issued on December 23, 1997, eight calendar days after the December 15, 1997 modified judgment in the present case.

It is true that, pursuant to Fed. R. Civ. P. 60(b)(5), consent decrees may (or even must) be modified or vacated in light of changed circumstances, including significant changes in the law or factual conditions. *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 2006 (1997); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); *David B. v. McDonald*, 116 F.3d 1146, 1147 (7th Cir. 1997). Defendants ignore that this rule is limited to relief from the prospective application of a decree. *See* Fed. R. Civ. P. 60(b)(5) ("it is no longer equitable that the judgment should have prospective application"); *Agostini*, 117 S. Ct. at 2018. It is not a basis for vacating or modifying a previously entered money judgment. *Id.*; *Cincinnati Insurance Co. v. Flanders Electric Motor Service, Inc.*, 131 F.3d 625, 630 (7th Cir. 1997); *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1077 (7th Cir. 1997). If defendants are correct that the present state of the law no longer supports the continuing vitality of the Decree, all that would happen would be that the Decree would be vacated effective today. That would not change the fact that the Decree was in effect in 1993 when defendants failed to satisfy the deadlines for implementing the mitigation plan. Presently vacating the Decree would not preclude the government from continuing to collect on the December 1997 judgment. *Cf. Balark v. City of Chicago*, 81 F.3d 658 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996) (vacating of consent decree does not preclude plaintiffs from subsequently

pursuing statutory attorney fees for the time period when the decree was in effect). Since defendants do not complain about any prospective effect of the Decree, it is unnecessary to reach the merits of whether the Decree should be vacated in light of alleged changes in the law.

IT IS THEREFORE ORDERED that defendants' motion to bar enforcement of penalty [109-1] is denied.

ENTER:

/s/ William T. Hart
UNITED STATES
DISTRICT JUDGE

DATED: MARCH 24, 1999

APPENDIX C

RELEVANT STATUTES AND REGULATIONS

33 U.S.C. § 1311 Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1344 Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. . . .

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:. . . .

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

40 C.F.R. § 230.3 Definitions

For purposes of this Part, the following terms shall have the meanings indicated:. . . .

(s) The term "waters of the United States" means:. . . .

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

* * *

33 C.F.R. § 328.3 Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means . . .

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or

destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

* * *

51 Fed. Reg. 41206

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross states lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

* * *